

Devil in the details

Construction contracts are littered with seemingly innocuous terms that appear time and time again. Nobody pays much attention to them. For example, how often do you agree to use "reasonable" or "best" endeavours to do something? What do these terms actually mean? Is there a difference? Why should you care?

These types of terms can have a serious impact on the rights and obligations you are signing up to. So it does pay to pay attention to the detail.

So what terms we are talking about? How do the courts interpret them? What do they mean for you?

Some of the common culprits include:

- agreeing to use "reasonable", "all reasonable" or "best" endeavours;
- agreeing that disputes arising "out of"; "under"; and/or "in connection with" the contract will be dealt with in a certain way; and
- agreeing to "provide the services under the terms of the contract" – often found in letters of intent.

A number of recent cases have provided helpful guidance on what these terms are taken to mean.

In *Rhodia International Holdings Ltd v Huntsman International LLC, Queen's Bench Division (Commercial Court), 21 February 2007* the court considered the term "reasonable endeavours". This concerned the purchase by Huntsman of Rhodia's European chemical surfactants business including a business in Cumbria. Both parties in this case were under an obligation to use "reasonable endeavours" to get consent to novation of certain contracts including energy supply contracts with C Ltd for the business in Cumbria. Although Huntsman's nominee took over the running of the energy supply contracts they were not novated to them. C Ltd sued Rhodia for outstanding invoices which Rhodia then tried to pass on to Huntsman claiming that its liability to C Ltd arose as a result of Huntsman's failure to use "reasonable endeavours" to obtain consent to novation of the energy supply contract.

The court concluded that "reasonable endeavours" generally means you only have to take one reasonable course of action and can then stop. If the contract stipulates what that course of action is, then you must follow it even though it might not normally be considered "reasonable". "Best endeavours" and "all reasonable endeavours" were distinguished as being tougher obligations and mean that **all** reasonable courses of action must be exhausted before you can stop. This is a departure from some previous judicial thinking which suggested that "best" was synonymous with "reasonable" endeavours.

The simple insertion of the word "all" or the substitution of "best" for "reasonable" can make a big difference.

What is meant by disputes arising "out of", "under" and "in connection with" the contract? This is used in the dispute clause of a contract to determine which disputes it will cover. This is important because if a dispute is not covered by the clause parties may be back to square one in deciding how to resolve a particular problem. This is subject of course to section 108 of the Housing Grants etc Act which makes adjudication mandatory for disputes arising "under" a construction contract.

Section 9.2 of JCT'05 mirrors section 108 of the Act – it refers to disputes "arising under this contract". On the other hand, Article 8 which deals with arbitration refers to "any dispute....of any kind whatsoever arising out of or in connection with this Contract".

The use of the words "in connection with" in Article 8, arguably give it a wider ambit than section 9.2. So, for example, disputes based on allegations of misrepresentation or mistake at the time the contract was entered into may be caught by Article 8 but not by section 9.2.

The recent case of *Fiona Trust & Holding Corporation and others v Privalov and others*, Court of Appeal 24 January 2007 gives some further guidance here. The case concerned eight contracts for the charter of ships. Parties had agreed that "any dispute arising under this charter shall be decided by the English Courts". The contract also later referred to disputes arising "out of this charter". Parties agreed that "out of" and "under" meant the same thing but were disagreed on what was that meaning. The owners of the ships sought to have the contracts set aside as they said they had been induced by bribery. The argument was whether that was a dispute "arising out of" the contract? The court decided that it was. In doing so it made the following points:-

- a dispute "arising out of" a contract means any dispute concerning the contract **except** one over the existence of the contract itself. A claim to set aside a contract is not the same as a claim that the contract never existed in the first place.
- There was a line of authority that "arising under" was narrower in scope than "arising out of". The court decided that any distinction between the two is meaningless. In theory one less fine distinction to worry about. The scope of the decision however is arguably restricted to international arbitration clauses and for anyone operating in Scotland, the Scottish courts recently decided in *Mackays Stores Ltd v Topward Ltd* that "arising under" still has a narrower meaning than "arising out of".

Finally, terms used in letters of intent can lead to very expensive misunderstandings. *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores*, Court of Appeal 22 November 2006 provides a useful reminder of how the courts go about interpreting terms in a contract. Somerfield and Skanska were in negotiation over the terms of a Facilities Management Agreement. While the terms of the Agreement were being finalised, a letter of intent was put in place whereby Skanska agreed to provide the services "under the terms of the contract". At the time of this agreement there was a June version of the draft Agreement in circulation and it was referred to in the letter of intent. Skanska argued that if you looked at the facts and circumstances surrounding conclusion of the letter of intent, that essentially all the phrase meant was that the scope of the services would be defined with reference to the June Agreement. Somerfield disagreed. It said that most of the terms of the June Agreement were incorporated within the letter of intent. The Court of Appeal agreed. It stated "*surrounding circumstances and commercial common sense do not represent a licence to the court to re-write a contract.....the court must be careful before departing from the natural meaning of the provision*".

Key Points

- "Reasonable endeavours" generally means only one reasonable course of action need be taken; "best endeavours" and "all reasonable endeavours" mean that all reasonable courses of action must be exhausted.
- "Disputes arising out of a contract" and "disputes arising under a contract" are both very wide. They will generally cover all matters related to the subject matter of that contract, except the existence of the contract itself.
- Where the natural meaning of a term is clear, the courts will not look beyond it to the facts & circumstances to give it a different meaning.

This article is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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